UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22459

WILLIAM REIGEL,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For Review of an Order of
the Securities and Exchange Commission

ANSWERING BRIEF OF RESPONDENT SECURITIES AND EXCHANGE COMMISSION

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COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was there substantial evidence that a securities salesman willfully violated antifraud provisions of the federal securities laws when the record showed that (a) he withheld from his customers adverse financial information about the issuer of the securities he was selling, and (b) he predicted a rapid, substantial price rise for those securities on the basis of negotiations between the issuer and others, when he had no reason to believe the negotiations would result in agreement or, if so, whether the agreement would be profitable for the issuer?

2. Was there substantial evidence that a securities salesman willfully participated in violations of provisions of the federal securities laws prohibiting the sale of unregistered stock when the record showed that he procured the stock that his employer unlawfully

sold under circumstances indicating such sales would occur?

3. When the Securities and Exchange Commission, on independent review and evaluation of the record in an administrative proceeding, found, on the basis of substantial evidence in the record, serious and willful violations of law and imposed a sanction authorized by statute, is its order subject to reversal because (a) matters considered by the hearing examiner, but expressly disregarded by the Commission, may have been objectionable; (b) a respondent in the proceeding had chosen to represent himself during the earlier stages of the hearings but did employ counsel in subsequent stages; (c) prior to the hearing the recollection of witnesses against the respondent had been refreshed by accurate memoranda of their prior statements; or (d) the sanction imposed by the Commission against the respondent was more stringent than the sanction that would have been imposed by the hearing examiner?

COUNTERSTATEMENT OF THE CASE

William Reigel ("Reigel") has petitioned this Court, pursuant to Section 25(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78y(a), to review an order of the Securities and Exchange Commission by which he has been barred from further association with any broker or dealer in securities.[1/] The order was entered at the conclusion

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1/ The Commission's order, dated July 14, 1967 (R. 2012), was based upon its findings and opinion of the same date (R. 2000-2011). A Memorandum Opinion and Order Denying Rehearing, Leave to Adduce Additional Evidence, and Stay was subsequently entered on November 1, 1967 (R. 2013-2017).

The record before the Commission is cited in this brief as "R. ___." Reigel's opening brief in this Court is cited as "Br. ___."

of administrative proceedings conducted by the Commission pursuant to Sections 15(b) and 15A of the Exchange Act, 15 U.S.C. 78o(b), 78o-3. The respondents in the proceedings were Century Securities Company ("Century"), which had been registered with the Commission as a broker and dealer in securities, that firm's two general partners and six individuals, including Reigel, who had been its sales representatives.[2/] The proceedings were held to determine, among other things, whether the respondents had willfully violated antifraud provisions of the Securities Act of 1933 ("Securities Act") and of the Exchange Act[3/] in the offer and sale of securities issued by Jayark Films Corporation ("Jayark"), and whether some of them had, as well, violated the registration provisions of the Securities Act in selling Jayark stock.

After the order for proceedings (R. 1228-1232) had been served by mail on October 20, 1964 (R. 1233-1241), answers that were, in effect, general denials were filed by all respondents (R. 1243-1260), including Reigel (R. 1246). Upon notice (R. 639-640; 1274)[4/] and after a preliminary conference (R. 1a-1t), evidentiary hearings were held in

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2/ Another salesman, Robert W. Nees, has also petitioned this Court for review of the Commission's order. That petition has been docketed as No. 22487.

3/ Section 17(a) of the Securities Act, 15 U.S.C. 77q(a), and Sections 10(b) and 15(c)(1) of the Exchange Act, 15 U.S.C. 78j(b) and 78o(c)(1), as well as Rules 10b-5 and 15c1-2, 17 CFR 240.10b-5 and 240.15c1-2, promulgated by the Commission under the latter statute.

4/ This notice is a subject of dispute in No. 22487. Reigel, however, makes no claim that he failed to receive timely notice of the hearings.

August 1965 (R. 1u-544). The Commission's staff produced two of Reigel's customers as witnesses against him at the hearings (R. 138-164). Although Reigel voluntarily appeared without counsel (R. 1286), he actively participated in the hearings, cross-examining the customer-witnesses who testified against him (R. 147-152, 161-163) and examining a witness for the defense (R. 511-515). Reigel did not, however, take the stand in his own behalf (R. 518-519). When the hearings were later reopened in February 1966, Reigel was represented by counsel (R. 1571), who participated in the cross-examination (R. 569-575, 582-590).[5/] Reigel's counsel did not seek leave to call him to the stand or otherwise supplement his defense at the reopened hearings.

On August 31, 1966, the hearing examiner filed an initial decision in which he found, among other things, that, in the sale of registered Jayark stock, Century, its owners and salesmen had willfully violated the antifraud provisions of the Securities Act and the Exchange Act (R. 1696, 1702).[6/] He found also that Century's owners had, with the assistance of Reigel, willfully violated Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. 77e(a), (c), in the offer and sale of unregistered Jayark stock (R. 1680). The examiner recommended that Century's registration be revoked and its owners barred from further association

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5/ The circumstances under which the hearings were reopened are described in detail in our answering brief (pp. 3-4) in No. 22487.

6/ Century and its owners were found also to have violated other rules under the Exchange Act (R. 1696).

with any broker or dealer in securities; he recommended also that one salesman be barred from such association, that Reigel and another salesman be suspended from association with any broker or dealer for six months and that a third salesman be censured (R. 1704).[7/]

The Commission made an independent review of the entire record (R. 2001). Although the hearing examiner had relied in part on an adverse inference from the failure of Reigel and other respondents to testify (R. 1691), the Commission expressly disclaimed any such reliance and based its decision solely upon the affirmative evidence in the record (R. 2009). It found this evidence to establish that, during the period between May 1963 and April 1964, Century, through its salesmen, "sold at retail a total of about 73,700 shares of Jayark stock at prices ranging generally from 5 to 7-3/4" (R. 2002), and

> "that respondents [including Reigel] engaged in a scheme to defraud investors by means of a persistent high-pressure campaign over the telephone to sell the speculative stock of Jayark, which involved the use of fraudulent representations and predictions. The similarity of the representations made indicates that the salesmen had a standard sales 'pitch'" (R. 2001-2002).

Jayark was a distributor of programs and motion pictures for television presentation (R. 965-967). The Commission found, and Reigel does not dispute, that Jayark's financial condition "was materially adverse" (R. 2003). During the year ended May 31, 1963, Jayark had suffered an operating loss of more than $60,000 (R. 958) and on that date had a deficit of about $100,000 (R. 957). A research report under Century's

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7/ Two salesmen originally named as respondents were not the subject of the hearing examiner's conclusions. The Commission had accepted the terms of a settlement offered by one (R. 1261-1273; 1996-1997), and had entered a default against another who had not appeared at the hearings (R. 1998-1999).

letterhead, dated June 1963, showed that Jayark had suffered a net operating loss of $21,615 during the five-month period ended October 31, 1962--a loss more than four times greater than the loss sustained for the comparable period a year earlier (R. 966).

The Commission found that, notwithstanding Jayark's serious financial difficulties, "no financial information was given [by the respondents, including Reigel] to any of the customer-witnesses prior to their purchases" (R. 2003). Indeed, in response to a direct question "about the financial background" of the company Reigel told a woman who had never before bought a speculative security (R. 149) that "everything was quite stable, quite satisfactory" (R. 140), and that "everything was absolutely perfect" (R. 141). Reigel apparently concedes that the investors who testified to the manner in which he induced their purchases were not provided with financial information until after their purchases had been made (Br. 12, 38-40; see R. 156, 163). In addition, he does not dispute that he knew the true facts of Jayark's condition, having been told of its deficit (R. 446) and having received copies of the various pertinent reports as they were prepared (R. 445).

Reigel not only kept this adverse information about Jayark to himself; he admits having predicted "a future rise in the price of Jayark stock" to two witnesses (Br. 10). The uncontroverted record shows that Reigel told one woman, who relied upon his statements in buying 500 shares of Jayark (R. 140, 150), that "they were going to merge with a television company who had a backlog of thousands

of pictures, and as soon as it was merged, within two weeks, the stock would go sky high, at least triple" (R. 140, 141, 151-152). Another woman, who told Reigel that she hoped to double her investment within six months was advised by him that to do so she should buy as much Jayark stock as she could; she bought 200 shares (R. 156-158).

Although Reigel talked in terms of a prospective merger, there was no evidence that a merger might occur; but the Commission recognized that there was credible testimony that Jayark was negotiating for the television rights to film libraries owned by Samuel Goldwyn Productions and Paramount Pictures Corporation (R. 2003, 2004). The Commission found it unnecessary to resolve a conflict in the testimony as to whether an oral agreement had actually been reached, because it found that the respondents, including Reigel, "had no knowledge of the terms of any agreement with Goldwyn, of the nature and quality of the film library, or of the other pertinent considerations making for the success or failure of such a venture" (R. 2004). Similarly, it found that "respondents had no information necessary to an informed judgment as to the prospect of Paramount leasing its films to Jayark, and, if so, as to whether such arrangement would prove to be successful" (R. 2004). On this basis, the Commission found that the "respondents had no adequate basis for their optimistic representations regarding the acquisition of film libraries" (R. 2003).[8/]

8/ Although Reigel recites the information known to those who had been involved in the negotiations (Br. 10-11, 43-45), he does not even now claim that he or any of the respondents were privy to all or any significant part of that information when he dealt with the investor-witnesses who testified against him.

The Commission also noted that it had "repeatedly held that predictions of substantial price increases within relatively short periods of time with respect to a speculative security are inherently fraudulent whether expressed in terms of opinion or fact" (R. 2003). Thus, the Commission concluded that the affirmative evidence in the record demonstrated that Reigel had willfully violated and aided and abetted violations of the antifraud provisions of the Securities Act and of the Exchange Act (R. 2001).

The Commission also found that Reigel had willfully participated in a public distribution of unregistered Jayark securities by Century. It was stipulated at the prehearing conference by Reigel, among others, that in September 1963 Century had purchased 3,750 shares of Jayark stock from persons who, at all pertinent times, were controlling stockholders of that company.[9/] It was also agreed that, although none of those shares had been registered with the Commission under the Securities Act, Century had applied some of that stock to cover earlier short sales to public investors and had sold the balance to other members of the investing public in small lots (R. 1q-1r, 8-9). The Commission noted that Reigel "did not himself sell any of the [unregistered shares to the public" (R. 2008); but the record shows, and he has never disputed, that he arranged for the acquisition of these shares by Century with full knowledge that they were not registered (R. 642, 646-647). Reigel does not claim that he was unaware of the seller's controlling

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9/ Although the record of the prehearing conference recites the year as 1964, the fact that 1963 was intended is clear from the several related exhibits accepted in evidence (R. 642-647, 669-670, 691).

position in Jayark, a fact that would have made registration necessary unless Century was taking the stock without any expectation of distributing it (see p. 17, infra).[10/] With regard to Reigel's knowledge of Century's intentions in purchasing this Jayark stock, there is undisputed evidence in the record as to the firm's dominant market position in the stock and heavy trading activity (R. 50, 671-701), as well as testimony that showed Jayark to have been a stock of particular interest to Reigel (R. 458-459) and exhibits showing that Reigel had been selling Jayark stock for the firm's account only a few months earlier (R. 985, 987). On this basis, the Commission found that Reigel "must have known that . . . [Century], which was making a market in Jayark stock, was acquiring the shares with a view to distribution" (R. 2008). It therefore concluded that "Reigel participated in the violations of Section 5" by Century (R. 2008).

In determining the sanctions to be imposed on Reigel and the other respondents, the Commission noted that Century and its owners had committed extensive violations, and that all the salesmen had engaged in fraudulent selling activities of a grave character. It thus concluded, particularly in the absence of any mitigative factors, that there was no basis for the differing sanctions recommended by the hearing examiner, revoked Century's registration and entered a bar

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10/ Reigel was told by the seller that he had an opinion of counsel that registration was not required (R. 642). The opinion did not, however, purport to cover subsequent sales by a purchaser from the controlling person (R. 642). It was based on the inapplicable assumption that a securities firm would be acting as broker for the controlling persons rather than, as occurred, purchase the unregistered securities for its own account as a dealer (R. 1172). Reigel did not request a copy of the opinion letter; Century obtained a copy only after the administrative proceedings had been instituted (R. 414-417, 1170-1172).

order against all of the individual respondents who had participated in the hearings (R. 2011).

STATUTES AND RULES INVOLVED

Sections 2(11), 4(1), 5 and 17(a) of the Securities Act, Sections 10(b), 15(b)(5) and (7), 15(c)(1) and 25(a) of the Exchange Act and Rules 10b-5 and 15c1-2 under the latter Act are set forth in the statutory appendix (see pp. 1a-4a, infra).

ARGUMENT

I. THE COMMISSION'S FINDINGS THAT REIGEL ENGAGED IN WILLFUL VIOLATIONS OF THE FEDERAL SECURITIES LAWS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Court's jurisdiction is based upon Section 25(a) of the Securities Exchange Act. That section provides, among other things, that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." And Section 10(e)(B) of the Administrative Procedure Act, as codified, 5 U.S.C. 706(2), provides that a reviewing court may "set aside agency action, findings, and conclusions found to be . . . (E) unsupported by substantial evidence . . . ." Thus, this Court has recognized that in proceedings such as this "the scope of . . . [its] review is to determine if the Commission's findings are supported by substantial evidence." Pierce v. Securities and Exchange Commission, 239 F. 2d 160, 162 (1956).

The Supreme Court has held that under the substantial evidence test a court that is reviewing agency action may not properly attempt to

determine where the weight of the evidence adduced before the agency lies. Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-621 (1966). It is the Commission that has the responsibility both of resolving conflicts in the evidence and of drawing the necessary inferences from the record.[11/] And one who challenges an agency's conclusions before a court of appeals must specifically designate those findings that he claims are unsupported by substantial evidence and must meet the burden of showing that this is so. North Whittier Heights Citrus Ass'n v. National Labor Relations Board, 109 F. 2d 76, 83 (C.A. 9), certiorari denied, 310 U.S. 632 (1940).[12/]

A. Reigel Willfully Violated Antifraud Provisions in the Sale of Registered Jayark Stock.

In substance, the antifraud provisions of the federal securities laws that Reigel and the other respondents were found to have violated prohibit any untrue statement or misleading omission of a material fact and any other conduct that "operates or would operate as a fraud or deceit" in connection with a securities transaction. Reigel does not

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11/ Archer v. Securities and Exchange Commission, 133 F. 2d 795, 799 (C.A. 8), certiorari denied, 319 U.S. 767 (1943); see Hartford Gas Co. v. Securities and Exchange Commission, 129 F. 2d 794, 796 (C.A. 2, 1942); cf., e.g., National Labor Relations Board v. Marcus Trucking Co., 286 F. 2d 583, 591-592 (C.A. 2, 1961); Standard Distributors, Inc. v. Federal Trade Commission, 211 F. 2d 7, 12 (C.A. 2, 1954).

12/ See, e.g., Keele Hair & Scalp Specialists, Inc. v. Federal Trade Commission, 275 F. 2d 18, 21 (C.A. 5, 1960); Steelco Stainless Steel, Inc. v. Federal Trade Commission, 187 F. 2d 693, 695 (C.A. 7, 1951).

claim that he was unaware of the "materially adverse" financial condition of Jayark at the time he was selling its stock. He offers no explanation for his affirmative representations that Jayark was in good financial condition (see page 6, supra).

In defense of his failure to disclose Jayark's recent losses and substantial deficits, Reigel contends that his customers would not have been interested in such information, pointing to the fact that they failed to rescind the transactions when such information was available to them (Br. 38-40). Customers should not have to study subsequently delivered literature, however, to check up on whether their security salesman has been honest with them.[13/] And it certainly cannot be assumed, at least in the absence of specific testimony of the customer to that effect, that facts relating significantly to the financial condition of a company would be immaterial.[14/] Moreover, this is a remedial proceeding to protect investors in the future, not an action in damages to recompense investors actually injured by Reigel's past misconduct. Thus, it is not necessary for the Commission to prove that any investors actually relied upon Reigel's

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13/ In this connection, it should be noted that Reigel was still making questionable representations about the stock to his customers (R. 143-145).

14/ It is generally recognized that under the antifraud provisions of the securities laws a basic test of materiality is "whether a reasonable man would attach importance . . . [to the undisclosed or misrepresented facts] in determining his choice of action in the transaction in question." E.g., Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F. 2d 833, 849 (C.A. 2, 1968) (en banc) (petitions for certiorari pending); Rogen v. Ilikon Corp., 361 F. 2d 260, 266 (C.A. 1, 1966).

misrepresentations and omissions.[15/]

Reigel's argument that persons who speculate in securities are not interested in financial information about the issuers was rejected by the very Congress that adopted the Exchange Act. As the House committee wrote, "[N]o speculator . . . can safely buy and sell securities . . . without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells." H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934), p. 11.[16/] Accordingly, it has recently been stated that speculators "are also 'reasonable' investors entitled to the same legal protection afforded conservative traders." Securities and Exchange Commission v. Texas Gulf Sulphur Co., supra, 401 F. 2d at 849 (footnote omitted).

The Commission found all the respondents to have made "predictions of substantial price increases within relatively short periods of time" (R. 2003). Certainly there is evidence of this as to Reigel. See, for example, the uncontroverted testimony of one witness who repeatedly stated--even upon cross-examination by him--that he had told her that the price would "at least triple" within a short period of

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15/ E.g., Berko v. Securities and Exchange Commission, 316 F. 2d 137, 143 (C.A. 2, 1963); Hughes v. Securities and Exchange Commission, 174 F. 2d 969, 973-974 (C.A. D.C., 1949); cf. San Francisco Mining Exchange v. Securities and Exchange Commission, 378 F. 2d 162, 165 (C.A. 9, 1967); Farrell v. United States, 321 F. 2d 409, 419 (C.A. 9, 1963), certiorari denied, 375 U.S. 992 (1964); Bobbroff v. United States, 202 F. 2d 389, 391 (C.A. 9, 1953).

16/ See D. Bellemore, Investments: Principles, Practices and Analysis 4 (2d ed. 1962).

time (R. 140-141, 151-152).[17/]

Reigel does not even claim support in the record for his assertion in connection with a sale that "within two weeks" Jayark was going to "merge" with another company with "a backlog of thousands of pictures" (R. 140-141). Instead, he argues (Br. 43-45) that negotiations were in fact conducted, and that an agreement was actually reached for Jayark's acquisition of television rights to film libraries. Whatever the actual state of negotiations (see p. 7, supra), the uncontroverted testimony of one of Century's partners shows that Reigel and the others at Century knew very little about the prospective deal: They knew that negotiations were in progress, but they "had no knowledge

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17/ Although the witness admitted that it might have been her characterization of Reigel's claims that the stock was "going to the moon" (R. 151), her testimony is extremely clear that Reigel told her that the price of the stock would shortly triple (R. 140-141, 151-152). The ambiguous phrasing of the argument made on page 41 of Reigel's brief might erroneously suggest otherwise.

Based solely upon a customer's affirmative response to a leading question (R. 152), Reigel also argues (Br. 41) that his predictions were conditioned upon the consummation of the merger. But he told the same customer without qualification that the deal would go through in two weeks (R. 140-141). Of course, even if a securities salesman were allowed to escape liability in some circumstances by couching predictions in conditional terms, he would still be required to have a reasonable basis, not evident on this record, for concluding that the prediction would come true if the condition should come to pass.

of the actual ending of negotiations," or that any "deal was closed" (R. 445).[18/] Thus, Reigel seems to be taking the rather remarkable position that, based solely upon his knowledge of the fact of negotiations, he was entitled to infer that an agreement would be reached and so predict to investors and was also justified in concluding and predicting that, once entered, the agreement would appear so advantageous to Jayark that the price of the stock would promptly triple. Since much more information than was available to Reigel and the other respondents would be necessary to determine the profitability of the venture that they glowingly described to investors, the Commission quite properly concluded that they "had no adequate basis for their optimistic representations regarding the acquisition of film libraries" by Jayark (R. 2003).

18/ Reigel asserts (Br. 45) the existence of "evidence in the record that Reigel was aware of the status of these negotiations at the time of his making any representations to the purchasers. . . ." His citations to the record, however, do not support the assertion. It was testified that the respondents had not been directly involved in the negotiations but had relied upon information provided by the principals (R. 444-445). Although it had been agreed that letters were received from the president of Jayark (R. 427), only one of them, Respondents' Exhibit E (R. 1174-1175), was introduced "as an indication of the nature of the advice received" (R. 427). Aside from assertions of optimism, that letter revealed little more than the existence of the negotiations, and there was no indication that other letters were more informative. More significantly, that letter, which was received after Reigel had made the sales found to have been fraudulent, cautioned that "there is no way of knowing, of course, whether these negotiations will succeed . . ." (R. 1174).

It has always been considered a violation of the antifraud provisions for a broker-dealer or associated person to represent to his customers that a security will soon appreciate in value or make any other material representations if he does not have an adequate basis for such predictions and representations.[19/] And the Commission has repeatedly held that predictions of a substantial increase of the price of a speculative security within a relatively short period of time are inherently fraudulent and cannot be justified.[20/] As one court has aptly noted, "'[N]o reliable expert technique has yet been developed or perhaps can ever be developed to ascertain with any degree of accuracy the future market price of securities or the effect of events upon it.'" United States v. Wolfson, CCH Fed. Sec. L. Rep., Par. 92,328, at 97,575 (C.A. 2, Dec. 27, 1968).

B. Reigel Willfully Participated in the Public Distribution of Unregistered Jayark Stock.

Section 5 of the Securities Act prohibits the sale of unregistered securities by use of the mails or interstate means unless some

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19/ E.g., R. A. Holman & Co. v. Securities and Exchange Commission, 366 F. 2d 446, 449-450 (C.A. 2, 1966), amended per curiam in other respects, 377 F. 2d 665 (C.A. 2), certiorari denied, 389 U.S. 991 (1967); Securities and Exchange Commission v. R. W. Holman & Co., 366 F. 2d 456, 458 (C.A. 2, 1966), rehearing denied per curiam, 377 F. 2d 665 (C.A. 2), certiorari denied, 389 U.S. 991 (1967); Berko v. Securities and Exchange Commission, supra, 316 F. 2d at 143.

20/ E.g., R. Baruch & Co., Securities Exchange Act Release No.7932, p. 6 (Aug. 9, 1966); Underhill Sec. Corp., [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep., Par. 77,270, at 82,415 (S.E.C., Aug. 3, 1965); Aircraft Dynamics Int'l Corp., 41 S.E.C. 566, 570 (1963); Alexander Reid & Co., 40 S.E.C. 986, 991 (1962).

exemption is available. The only exemption that could be available here is that in Section 4(1) of that act for "transactions by any person other than an issuer, underwriter, or dealer."[21/] The Commission found that Century was an underwriter within the meaning of Section 2(11), since it purchased the Jayark stock in question from a controlling person "with a view to . . . the distribution" of the securities; namely, to cover its existing short position and to make additional sales to the public (R. 2007). These sales therefore violated Section 5.

The Commission found the record to establish "that Reigel participated in the violation of Section 5" of the Securities Act committed by Century and its owners (R. 2008). Reigel does not dispute his central role in Century's acquisition of unregistered Jayark stock, nor does he deny that the stock's public distribution by Century was a violation of that section. He contends only that he did not himself effect a sale of the unregistered securities (Br. 31-32), and that, in any event, his conduct in connection with the Section 5 violations was not "willful" (Br. 32-37).

The fact that Reigel did not himself effect a sale of the unregistered Jayark stock is not significant in the light of the Commission's finding that he participated in the violation of Section 5 by arranging for the acquisition of the shares to be sold. Section 15(b)(7) of the Exchange Act, 15 U.S.C. 78o(b)(7), when read with

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21/ The so-called private offering exemption of Section 4(2), 15 U.S.C. 77d(2), only applies to "transactions by an issuer."

Section 15(b)(5)(E), 15 U.S.C. 78o(b)(5)(E), expressly authorizes the Commission to take remedial action against any person who "has willfully aided, [or] abetted . . . the violation by any other person of the Securities Act of 1933 . . . ." It is not necessary to determine whether these provisions, enacted in 1964, were intended to have a retroactive effect,[22/] since they merely codified existing law. That the participation by a person associated with a broker-dealer in a firm's unlawful conduct constituted aiding and abetting the violation and provided a basis for remedial action against the associated person had already been the Commission's long-standing interpretation[23/] tacitly approved by the courts.[24/] Congress

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22/ E.g., M. G. Davis & Co. v. Cohen, 256 F. Supp. 128, 133-135 (S.D. N.Y.), affirmed on other grounds, 369 F. 2d 360 (C.A. 2, 1966); see R. Phillips & M. Shipman, An Analysis of the Securities Acts Amendments of 1964, 1964 Duke L. J. 706, 809, 815 (1964).

23/ See, e.g., Luckhurst & Co., 40 S.E.C. 539 (1961); Mason, Moran & Co., 35 S.E.C. 85 (1953); William Todd, Inc., 32 S.E.C. 537 (1951); Henry P. Rosenfeld, 30 S.E.C. 941, 944 n.3 (1950); Burley & Co., 23 S.E.C. 461, 468 n.11 (1946).

24/ See Batten & Co. v. Securities and Exchange Commission, 345 F. 2d 82 (C.A. D.C., 1964); Barnett v. United States, 319 F. 2d 340 (C.A. 8, 1963); Securities and Exchange Commission v. Scott Taylor & Co., 183 F. Supp. 904, 909 n.12 (S.D. N.Y., 1959); Securities and Exchange Commission v. Timetrust, Inc., 28 F. Supp. 34, 43 (N.D. Cal., 1939).

The courts have also applied the aiding and abetting doctrine under other provisions of the securities acts without any explicit statutory authority. See Ross v. Licht, 263 F. Supp. 395, 410 (S.D. N.Y., 1967) (alternative holding); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 682 (N.D. Ind., 1966), adhered to, 286 F. Supp. 702, 725 (N.D. Ind., 1968); Pettit v. American Stock Exchange, 217 F. Supp. 21, 28 (S.D. N.Y., 1963).

recognized the existence of this doctrine and expressly approved it when it enacted Section 15(b)(5)(E). As the Senate Committee explained:

> "In a number of cases, the Commission has held that an individual participated in violations by a broker or dealer as an aider and abettor, and the proposed change in clause (E) . . . would codify this practice and clarify the basis for it."

S. Rep. No. 379, 88th Cong., 1st Sess. (1963), p. 76.

It has consistently been held that a decision to act when the relevant facts are known constitutes willfulness. For this purpose it is not necessary to show that the violator gave any consideration to the lawfulness or unlawfulness of his actions.[25/] Indeed, if an inquiry that a person should have made would have disclosed such relevant facts, it is not necessary for this purpose even to show that he actually knew them.[26/] And his duty to investigate is particularly clear when a claim of exemption from registration is made, since the law places the burden of proof upon the person seeking to rely upon the exemption. Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 126 (1953); Securities and Exchange Commission v. Sunbeam Gold Mines Co., 95 F. 2d 699, 701 (C.A. 9, 1938).[27/]

25/ See, e.g., Gearhart & Otis, Inc. v. Securities and Exchange Commission, 348 F. 2d 798, 802-803 (C.A. D.C., 1965); Tager v. Securities and Exchange Commission, 344 F. 2d 5, 8 (C.A. 2, 1965).

26/ See, e.g., Dlugash v. Securities and Exchange Commission, 373 F. 2d 107, 109-110 (C.A. 2, 1967); Barnett v. United States, 319 F. 2d 340, 343 (C.A. 8, 1963); United States v. Schaefer, 299 F. 2d 625, 629 (C.A. 7), certiorari denied, 370 U.S. 917 (1962); Stone v. United States, 113 F. 2d 70, 74-75 (C.A. 6, 1940) (dictum); cf. Securities and Exchange Commission v. Culpepper, 270 F. 2d 241, 251 (C.A. 2, 1959).

27/ Accord, e.g., Gilligan, Will & Co. v. Securities and Exchange Commission, 267 F. 2d 461, 467 (C.A. 2), certiorari denied, 361 U.S. 896 (1959).

Reigel is plainly incorrect in suggesting (Br. 34-36) a virtual lack of responsibility on the part of a securities salesman to inquire concerning the propriety of transactions in which he is requested to participate in connection with his employment. Section 15(b) of the Exchange Act establishes standards to which "any person" who seeks to enter or to continue employment in the highly sensitive securities field must conform. Of course, it may be that salesmen, by virtue of their subordinate roles, may not be in a position to know everything that their superiors readily can and do ascertain. Such cannot be said to be the case here, however. Having been with Century since prior to the time that it had underwritten a public distribution of securities by Jayark (R. 459), Reigel plainly knew or had reason to know that the sellers were at all pertinent times "officers, directors, and controlling stockholders of Jayark Films" (R. 1q). Furthermore, he had been informed that the shares they offered were not registered (R. 642). In view of Century's dominant market position and heavy trading activity in Jayark stock (R. 50, 671-701) and his own interest in it (R. 459), Reigel could not have believed that Century was taking the stock for investment. Accordingly, there was substantial evidence for the Commission's finding that Reigel "must have known that registrant [Century] . . . was acquiring the shares with a view to distribution" (R. 2008).

Reigel had no right to rely on the conclusory statement of Kaufman, president of Jayark, that the latter had been advised by

company counsel that the "shares are exempt from SEC registration under existing regulations . . ." (R. 642), without asking to see the opinion or inquiring as to its basis. The opinion was in fact inapplicable because it assumed that any securities firm would be acting as a broker rather than as a dealer for its own account (R. 1172); moreover, it purported to cover only the initial sale by the controlling person, not subsequent sales by others (R. 1172). In any event, there may be a finding of willfulness even when an opinion of counsel has been examined and purports to apply to a particular transaction.[28/]

II. REIGEL WAS ACCORDED A FAIR HEARING.

A. The Commission Did Not Draw an Adverse Inference from Reigel's Failure to Testify.

Reigel argues (Br. 13-20) that no adverse inference may properly be drawn from his failure to testify, emphasizing that the hearing examiner did draw such an inference (R. 1691). But the Commission based its findings "upon an independent review of the record" (R. 2001) and explicitly stated that

> ". . . in making our findings with respect to . . . Reigel [and others] . . . we have not relied on any adverse inference from their failure to testify, but based our determination solely on the evidence in the record" (R. 2009).

28/ 2 L. Loss, Securities Regulation 1309 (2d ed. 1961); cf., e.g., United States v. Schaefer, supra, 299 F. 2d at 630-631.

Under Section 8(a) of the Administrative Procedure Act, as codified, 5 U.S.C. 557(b), on "review of the initial decision, the agency has all the powers which it would have in making the initial decision . . . ." It is thus the Commission's findings, not those of the examiner, that are the subject of review before this Court; and the hearing examiner's conclusions are of limited relevance in this regard. Pierce v. Securities and Exchange Commission, supra, 239 F. 2d at 162-163.[29/] Although a reviewing court must "determine the substantiality of evidence on the record including the examiner's report," Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 493 (1951), an examiner's initial decision is significant only because "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight," 340 U.S. at 488. Thus, the Supreme Court reasoned that

> ". . . evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the . . . [agency's] than when he has reached the same conclusion."
> 340 U.S. at 488 (emphasis added).

Where, as here, the conclusions of the Commission and the examiner are in accord, however, it follows that the fact that the examiner considered additional factors as supporting his decision cannot detract from the Commission's conclusions, and the Commission's treatment of the examiner's decision should be a matter of no concern to this

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29/ Accord, e.g., Vickers v. Securities and Exchange Commission, 383 F. 2d 343 (C.A. 2, 1967).

Court. This is precisely the approach recently taken by the Court of Appeals for the District of Columbia Circuit in a similar situation involving the Commission. Strathmore Sec., Inc. v. Securities and Exchange Commission, CCH Fed. Sec. L. Rep., par. 92,335, at 97,605 n.2 (Jan. 24, 1969). Accordingly, it is unnecessary for this Court to decide whether the hearing officer, on the basis of N. Sims Organ & Co. v. Securities and Exchange Commission, 293 F. 2d 78, 80-81 (C.A. 2, 1961), certiorari denied, 368 U.S. 968 (1962), correctly drew an inference from Reigel's failure to testify (R. 1691).

In any event, there is no basis in the record for Reigel's assertion that the hearing examiner induced Reigel's silence by permitting "inquiry into irrelevant and prejudicial areas" during the testimony of Fred Colton, another of the respondents (Br. 4-5, 14-16). Immediately after Colton's testimony Reigel and the other respondents who were present indicated that they did intend to take the stand in their own defense (R. 470F). When they changed their minds and declined to testify the next day, Colton made the fragmentary statement relied on by Reigel (Br. 15 n.1) that the respondents were "reluctant to take the stand" because there had been cross-examination as to matters allegedly "outside the scope and period covered by the

charges . . ." (R. 518). This statement was never completed, however, despite the hearing examiner's insistence that Colton finish his remarks to make sure that no rights were prejudiced (R. 518-519). Reigel himself gave no explanation of his silence, although he inquired and was assured that he could file a brief (R. 519). The hearing examiner had expressly reserved decision on the issue raised during the Colton testimony, supra, and in his initial decision he subsequently ruled against the position urged by the Commission's staff (R. 1696 n.48).[29a/] Even if it could be assumed that Reigel's failure to testify had been caused by some misunderstanding about the legal implications of the examiner's reservation of decision, and that a layman (as distinguished from an attorney) might take matters in his own hands and simply decline to testify rather than pursue his objections in the usual fashion, such an assumption would not avail Reigel here. Before the record was reopened, inter alia, for testimony by another respondent, Reigel was represented by an attorney who was clearly aware of the prior events (R. 610-611). Reigel's attorney could have asked similar relief for his client and urged the hearing examiner to decide the

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29a/ The hearing examiner distinguished United States v. Ross, 321 F. 2d 61, 67 (C.A. 2, 1963), where it had been held proper in a criminal case to cross-examine a defendant securities salesman to rebut "a claim of ignorance and innocence by showing . . . [the defendant] had long drifted among houses selling similarly worthless stock by similar methods."

reserved question so that he could determine whether Reigel should take the stand. If not satisfied with the ruling, he could have sought interlocutory review by the Commission. See Rule 12(a) of the Commission's Rules of Practice, 17 CFR 201.12(a). Instead, he apparently decided to rest on the record as it stood and to use this alleged error to attack the hearing examiner's decision on the merits if it turned out adverse to Reigel.

3. The Commission Did Not Rely upon Hearsay Evidence.

In connection with its determination that the "[r]espondents had no adequate basis for their optimistic representations regarding the acquisition [by Jayark] of film libraries," the Commission noted evidence in the record that was conflicting as to when and whether there had been a "deal" between Jayark and Goldwyn, and, in that connection, referred to a certain letter from Goldwyn's counsel that had been admitted into evidence without objection (R. 2003). The Commission, however, did not make any finding with respect to the conflicting evidence; its holding on this point was based on the fact that there was no showing "how profitable the Goldwyn transaction if consummated would have been to Jayark . . ." (R. 2004) and, as noted at page 7, supra, that "respondents had no knowledge of the terms of any agreement with Goldwyn, of the nature and quality of the film library, or of any of the other pertinent considerations making for the success or failure of such a venture." In this context, the Commission's reference

to the letter from Goldwyn's counsel could not have been prejudicial, since the Commission did not rely upon it.

In any event, as petitioner concedes (Br. 26), "technical rules of evidence do not apply in an administrative proceeding." See Section 7(c) of the Administrative Procedure Act, as codified, 5 U.S.C. 556(d); Federal Trade Commission v. Cement Institute, 333 U.S. 683, 705-706 (1948); Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229-230 (1938).

C. There Was Nothing Improper or Prejudicial in Refreshing the Recollection of Investor-Witnesses by Showing Them Memoranda of Prior Interviews.

Reigel claims that the witnesses for the Commission's staff were "improperly educated" (Br. 24). For this conclusion he relies solely upon the fact that, prior to testifying, the witnesses were shown memoranda of their earlier interviews with Commission investigators in order to refresh their recollections (Br. 24-26). No claim is made (R. 161, 199, 279, 295) that the investigators did anything more than simply ask questions at the original interviews. Nor is any attempt made to contest the testimony that the memoranda of the interviews were highly accurate (R. 299, 360).[30/] The record shows that, while the witnesses were on the stand, respondents were aware of the use of the memoranda, and that the only time a request

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30/ Thus it is of no significance that the memoranda contained some unspecified pencil notations (R. 530-531).

was made to examine one of the memoranda for the purpose of cross-examining the witness, this was permitted (R. 365, 2015). It is therefore not surprising that Reigel points to no specific instance of prejudice to support his vague claim of unfairness in this regard.

It is well established that the recollection of a witness may be refreshed by showing him a memorandum of his prior statement, whether that memorandum was written by the witness himself or by some other person, and whether the memorandum was written at the time of the underlying events or later.[31/] Reigel's only citation to the contrary is a provision of California state law no longer in effect (Br. 25-26). He does not disclose that in the present California law "there is no restriction . . . on the means that may be used to refresh recollection." Comment--Assembly Committee on Judiciary, Cal. Evid. Code § 771.[32/]

31/ E.g., United States v. Riccardi, 174 F. 2d 883 (C.A. 3, 1949); Dowling Bros. Distilling Co. v. United States, 153 F. 2d 353 (C.A. 6, 1946); Fanelli v. United States Gypsum Co., 141 F. 2d 216 (C.A. 2, 1944); United States v. Ward Baking Co., 224 F. Supp. 66 (E.D. Pa., 1963); C. McCormick, Evidence 14-17 (1954); 3 J. Wigmore, Evidence §§ 758-762 (3d ed. 1940).

32/ Indeed, the fact that the memorandum was made "by some other person for the purpose of recording the witness' statement at the time it was made" would not prevent the introduction into evidence of the memorandum itself as "past recollection recorded." Cal. Evid. Code § 1237.

D. Reigel's Election To Forego Counsel at the Initial Hearing Provides No Basis for Attack on the Commission's Decision.

Section 6 of the Administrative Procedure Act, as codified, 5 U.S.C. 555(b), provides that "a party is entitled to appear in person or by or with counsel . . . in an agency proceeding." Reigel does not contend that he was in any way deprived of this statutory right (Br. 29). Plainly there is no requirement that counsel be provided in this administrative context.[33/] It is no fault of the Commission that Reigel chose not to be represented by counsel at the hearings.[34/] Indeed, although he chose to represent himself at the August 1965 hearings, Reigel has had the advice of, and has been represented by, counsel at subsequent stages in the proceeding (e.g., R. 1379-1380, 1571).

Having earlier argued that the record contains various irregularities (Br. 13-28), Reigel then asserts (Br. 29) that ". . . the lack of counsel magnified the impact of the other procedural infirmities. . . ." We have already shown that there are no procedural infirmities in the record (see pp. 21-27, supra). Moreover, Reigel's counsel has only recently decided that these infirmities exist. Although he entered the case long before the hearing examiner's initial decision, and, indeed, before the record had been reopened for Robert W. Nees, he made no effort to remedy them until after an adverse decision had been handed down as to his client.

33/ Boruski v. Securities and Exchange Commission, 340 F. 2d 991, 992 (C.A. 2), certiorari denied, 381 U.S. 943, 944 (1965).

34/ Cf. Concrete Materials Corp. v. Federal Trade Commission, 189 F. 2d 359, 362 (C.A. 7, 1951).

It is also argued (Br. 30) that Reigel's decision to represent himself imposed an "affirmative duty" upon the hearing examiner "to avoid using technical language without explaining to Reigel, in lay language, the meaning of the terms." Even the isolated example that Reigel now provides in an attempt to prove his point (Br. 30 n.6) fails to support his contention.[35/] More important, however, as the Commission noted (R. 2014-2015), the record contains a brief filed by Reigel's present counsel conceding:

> "The transcript is replete with instances wherein the hearing examiner, aware of the pro per status of the Respondents, endeavored to assist them in the presentation of their case" (R. 1497).

This concession accurately reflects the hearing examiner's efforts in this regard (e.g., R. 103, 394, 421, 480).

III. THE REMEDIAL ACTION TAKEN AGAINST REIGEL WAS WELL WITHIN THE COMMISSION'S DISCRETION.

Under Sections 15(b(5) and (7) of the Exchange Act, the Commission has been authorized by Congress, among other remedial alternatives, to

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35/ Reigel asserts that he did not understand the significance of the hearing examiner's "decision to reserve decision," but the record shows that the hearing examiner made it clear that he would not actually admit the evidence until he had satisfied himself that it would be proper to do so (R. 469-470). He said that he wanted to examine relevant authority before making up his mind whether to consider the evidence, and that "unless and until I am sure [that it is proper], I won't take it" (R. 470).

Reigel also suggests a duty to avoid "the admission of irrelevant evidence" (Br. 30). He does not point to any "irrelevant evidence" to support this complaint, and we are not aware of any in the present record.

bar any person from being associated with a broker or dealer "if the Commission finds that such . . . barring . . . is in the public interest . . .," and that he has violated the Securities Act or the Exchange Act. All the statutory requirements for the imposition of a bar order have been met.

The Supreme Court, in American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 112-113 (1946), has stated:

> "It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence. . . .' While recognizing that the [Securities and Exchange] Commission's discretion must square with its responsibility, only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter."

In Pierce v. Securities and Exchange Commission, supra, 239 F. 2d 160, this Court applied that "fundamental principle" to its review of an order of the Commission entered, as was the order below, pursuant to Section 15(b) of the Exchange Act. It stated:

> "The Commission is given the duty to protect the public. What will protect the public must involve, of necessity, an exercise of discretionary determination. This Court ordinarily should not substitute its judgment of what would be appropriate under the circumstances in place of the Commission's judgment as to measures necessary to protect the public interest." 239 F. 2d at 163. 36/

Reigel does not appear to deny the broad discretion with which Congress has entrusted the Commission with respect to the choice of appropriate sanctions. He argues, however, that this case is different

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36/ Accord, e.g., Tager v. Securities and Exchange Commission, supra, 344 F. 2d at 8-9.

because the hearing examiner recommended a lesser sanction (Br. 21-24).

We have already shown that the hearing examiner's initial decision is only one factor to be considered in reviewing the Commission's independent findings (see pp. 22-23, supra). This is particularly so when, as here, neither the demeanor of the respondent himself nor that of conflicting witnesses is in issue. Although Reigel emphasizes the importance given to the hearing examiner's findings as to demeanor and credibility (Br. 21-22), he does not point to any evidence of this character that is relevant to the propriety of the sanction imposed.

In San Francisco Mining Exchange v. Securities and Exchange Commission, supra, 378 F. 2d 162, this Court recently considered, in an analogous context, contentions remarkably similar to those that Reigel makes here. In that case the Court reviewed an order of the Commission withdrawing the registration of a national securities exchange pursuant to Section 19(a)(1) of the Exchange Act, 15 U.S.C. 78s(a)(1).[37] As here, in its review of the hearing examiner's initial decision

> ". . . the Commission made its own findings of fact which were substantially in accord with those made by the examiner. However, the Commission rejected the recommendation of the hearing examiner concerning the remedy to be imposed, and ordered withdrawal of the Exchange's registration." 38/

37/ That section empowers the Commission to take remedial action for the protection of investors when an exchange has committed statutory violations or failed to enforce compliance by its members. As in the case of Section 15(b)(7), the Commission may either "withdraw" (revoke) the exchange's registration or suspend it for no more than a year.

38/ The hearing examiner had recommended that the exchange be permitted to effect a complete reorganization within 90 days to avoid having its registration withdrawn. 378 F. 2d at 164.

378 F. 2d at 164. Similar to Reigel's contentions, the exchange urged that the remedy recommended by the examiner was supported by the record, and that ordered by the Commission was not. But this Court held:

> "The Commission found that the Exchange was in violation of section 19(a)(1) and, in our opinion, this finding is supported by substantial evidence. Where the established facts empower an administrative agency to take particular remedial action, the determination of whether it should take that action rests within the sound discretion of the agency."

378 F. 2d at 165 (footnote omitted). Observing that the Commission had given due consideration to relevant factors, the Court concluded that "the Commission did not abuse its discretion in ordering withdrawal of the Exchange's registration," 378 F. 2d at 166.

There is nothing improper in the fact that the Commission barred each of the several respondents without reference to the disparity in culpability noted by the hearing examiner, particularly since the provisions of Section 15(b) of the Exchange Act are not penal but merely afford a means by which the public may be protected in the future from those who have shown themselves in the past to be unqualified to participate in so sensitive a field as the securities business. Pierce v. Securities and Exchange Commission, supra, 239 F. 2d at 163.[39/]

39/ Accord, Berko v. Securities and Exchange Commission, supra, 316 F. 2d at 141; Blaise, D'Antoni & Associates, Inc. v. Securities and Exchange Commission, 289 F. 2d 276, 277 (C.A. 5), rehearing denied per curiam, 290 F. 2d 688 (C.A. 5, 1961); Associated Sec. Corp. v. Securities and Exchange Commission, 283 F. 2d 773, 775 (C. A. 10, 1960). When punishment for securities laws violations is found appropriate, it is effected by the Attorney General through application of criminal sanctions. See, e.g., Section 20(b) of the Securities Act, 15 U.S.C. 77t(b); Section 21(e) of the Exchange Act, 15 U.S.C. 78u(e).

Thus, the Commission stated that

> ". . . the gravity of the violations found, particularly the fraud violations, when measured against the absence of any other substantial mitigative factors, convinces us that it would be inappropriate to permit any of the respondents to continue in the securities business" (R. 2011).

Since the Commission found that public interest required the least culpable of them to be barred from the securities field in the light of the factors mentioned,[40/] it would have served no purpose for the Commission to have attempted to distinguish between the respondents. Moreover, any attempt to compare the nature of the remedial action taken against one person with that found appropriate for another has been held to be irrelevant upon review by a court of appeals.[41/]

The fact that prior to the hearing the Commission had accepted an offer of settlement for a 45-day suspension by another salesman has no relevance to the foregoing, particularly since he had been employed by Century for only a short period, had voluntarily

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40/ Reigel's exclusion from the securities business is not necessarily permanent. Section 15(b)(7), pursuant to which the order barring Reigel has been entered, provides that an individual who has been barred may not become associated with a broker or dealer "without the consent of the Commission . . . ." Without any suggestion as to what the Commission in the future might do should Reigel apply, it should be noted that the Commission frequently receives applications for reentry from barred persons and sometimes grants them, usually subject to certain safeguards, when it deems the public interest no longer requires the applicant's exclusion from the securities business.

41/ Vanasco v. Securities and Exchange Commission, 395 F. 2d 349, 353 (C.A. 2, 1968); Winkler v. Securities and Exchange Commission, 377 F. 2d 517, 518 (C.A. 2, 1967); Dlugash v. Securities and Exchange Commission, 373 F. 2d 107, 110 (C.A. 2, 1967).

terminated his employment because he became dissatisfied with Century's method of operations and had advised his customers to sell their Jayark stock and purchase less speculative securities (R. 1996-1997).

CONCLUSION

For the reasons stated, the order of the Commission barring Reigel from association with any broker or dealer should be affirmed.

Respectfully submitted,

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Dated: February 1969

STATUTORY APPENDIX

STATUTORY APPENDIX

Securities Act of 1933

Section 2(11), 15 U.S.C. 77b(11):

SEC. 2. When used in this title, unless the context otherwise requires—

. . . .

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or[2] sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

Section 4(1), 15 U.S.C. 77d(1):

SEC. 4. The provisions of section 5 shall not apply to—

(1) transactions by any person other than an issuer, underwriter, or dealer.

Section 5, 15 U.S.C. 77e

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;[4] or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

Section 17(a), 15 U.S.C. 77q(a):

SEC. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. 78j(b):

SECTION 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 15(b)(5), 15 U.S.C. 78o(b)(5):

(5) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—

(A) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this title, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(B) has been convicted within ten years preceding the filing of the application or at any time thereafter of any felony or misdemeanor which the Commission finds—

(i) involves the purchase or sale of any security.

(ii) arises out of the conduct of the business of a broker, dealer, or investment adviser.

(iii) involves embezzlement, fraudulent conversion, or misappropriation of funds or securities.

(iv) involves the violation of section 1341, 1342, or 1343 of title 18, United States Code.

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(D) has willfully violated any provision of the Securities Act of 1933, or of the Investment Advisers Act of 1940, or of the Investment Company Act of 1940, or of this title, or of any rule or regulation under any of such statutes.

(E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933, or the Investment Advisers Act of 1940, or the Investment Company Act of 1940, or of this title, or of any rule or regulation under any of such statutes or has failed reasonably to supervise, with a view to preventing violations of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this clause (E) no person shall be deemed to have failed reasonably to supervise any person, if—

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(F) is subject to an order of the Commission entered pursuant to paragraph (7) of this subsection (b) barring or suspending the right of such person to be associated with a broker or dealer, which order is in effect with respect to such person.

Securities Exchange Act of 1934

Section 15(b)(7), 15 U.S.C. 78o(b)(7):

(7) The Commission may, after appropriate notice and opportunity for hearing, by order censure any person, or bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer, if the Commission finds that such censure, barring, or suspension is in the public interest and that such person has committed or omitted any act or omission enumerated in clause (A), (D) or (E) of paragraph (5) of this subsection or has been convicted of any offense specified in clause (B) of said paragraph (5) within ten years of the commencement of the proceedings under this paragraph or is enjoined from any action, conduct, or practice specified in clause (C) of said paragraph (5). It shall be unlawful for any person as to whom such an order barring or suspending him from being associated with a broker or dealer is in effect, willfully to become, or to be, associated with a broker or dealer, without the consent of the Commission, and it shall be unlawful for any broker or dealer to permit such a person to become, or remain, a person associated with him, without the consent of the Commission, if such broker or dealer knew, or in the exercise of reasonable care, should have known, of such order.

Section 15(c)(1), 15 U.S.C. 78o(c)(1):

(c)(1) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent.

Section 25(a), 15 U.S.C. 78y(a):

SECTION 25. (a) Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended

Rules Under the Securities Exchange Act of 1934

Rule 10b-5, 17 CFR 240.10b-5:

Rule 10b–5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 15c1-2, 17 CFR 240.15c1-2:

Rule 15c1–2. Fraud and Misrepresentation

(*a*) The term "manipulative, deceptive, other fraudulent device or contrivance," as us in section 15(c)(1) of the Act, is hereby defin to include any act, practice, or course of busine which operates or would operate as a fraud deceit upon any person.

(*b*) The term "manipulative, deceptive, other fraudulent device or contrivance," as us in section 15(c)(1) of the Act, is hereby defin to include any untrue statement of a material fa and any omission to state a material fact necessa in order to make the statements made, in the lig of the circumstances under which they are ma not misleading, which statement or omission made with knowledge or reasonable grounds to b lieve that it is untrue or misleading.

(*c*) The scope of this rule shall not be li ited by any specific definitions of the term "mani ulative, deceptive, or other fraudulent device contrivance" contained in other rules adopt pursuant to section 15(c)(1) of the Act.